BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KENNETH E. CREVIER Claimant VS. **PINNACLE TRANSPORTATION SYSTEMS and DIVERSIFIED HUMAN RESOURCES, INC.** Respondent AND **UNKNOWN** Insurance Carrier	)	Docket No. 1,031,055

ORDER

STATEMENT OF THE CASE

Respondents Pinnacle Transportation Systems (Pinnacle) and Diversified Human Resources, Inc., (Diversified) requested review of the November 26, 2008, Award and the December 10, 2008, Nunc Pro Tunc Award entered by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on March 10, 2009. Roger D. Fincher, of Topeka, Kansas, appeared for claimant. Kip A. Kubin, of Kansas City, Missouri, appeared for respondents[1].

The Administrative Law Judge (ALJ) found that claimant had an 18 percent functional disability, which was a split of the rating opinions of Dr. Chris Fevurly and Dr. Lynn Curtis. The ALJ further found that claimant was entitled to a work disability. The ALJ computed claimant's task loss to be 46.25 percent, which was a split of the task loss opinions of Drs. Fevurly and Curtis. The ALJ concluded that although claimant had been unemployed since the date of the work-related accident, he failed to make a good-faith effort to obtain employment and imputed a weekly wage of $262 to the claimant. The ALJ

[1] At oral argument to the Board, the attorney for respondents said that he represented both Pinnacle and Diversified, and that the Board should treat both as the same employer.

found that claimant had a wage loss of 32 percent before April 30, 2007, and 53 percent after April 30, 2007. The ALJ based claimant's work disability on the wage loss that would have been in effect when claimant was found to be at maximum medical improvement (MMI), 53 percent, and found he had a 49 percent work disability.

The Board has considered the record and adopted the stipulations listed in the Award, with the exception of Stipulation No. 6.[2] In addition, during oral argument to the Board, the parties agreed that the ALJ's determination that claimant suffered an 18 impairment of function is not disputed on appeal.

ISSUES

Respondents request review of the ALJ's finding that claimant sustained a 46.25 percent task loss. Respondents argue that instead, the Board adopt the task loss opinion of Dr. Fevurly and find that claimant sustained a task loss of 28 percent.

Claimant argues that the Board should adopt the task loss opinion of Dr. Curtis and find that he sustained a 64 percent task loss. Further, claimant argues that he made a good faith effort to find employment, although a heath condition unrelated to his work related injury delayed his search efforts. Accordingly, claimant requests the Board find he has a 100 percent wage loss, which computes to an 82 percent work disability.

The issue for the Board's review is: What is the nature and extent of claimant's disability? Specifically:

(1) What is claimant's percentage of task loss?

(2) Did claimant exhibit good faith in his post-accident job search? If so, is he entitled to his 100 percent actual wage loss? If not, what is his wage earning ability?

FINDINGS OF FACT

Claimant worked for respondent as a truck driver. His average weekly wage (AWW) was an issue at the regular hearing. The ALJ found in the Award that claimant's preinjury AWW was $384.02 through April 30, 2007, and $564.02 after April 30, 2007. These findings were not appealed.

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[2] The Kansas Workers Compensation Fund was dismissed as a party to this claim by an Agreed Order of Dismissal filed September 4, 2008, pursuant to respondent's agreement to pay any benefits that may be awarded claimant in this matter. However, the records for the Kansas Division of Workers Compensation do not show an insurance carrier for either Pinnacle Transportation Systems or Diversified Human Resources, Inc., and it is not known whether either respondent is a qualified self-insured.

On August 29, 2006, claimant was injured when his tractor was rear-ended while stopped on an on-ramp. He drove himself to the emergency room, where he complained of pain in his head and neck. Later he developed pain in his low back. Claimant admits that he suffered from neck and low back pain before the accident of August 29, 2006. In fact, just the day before his accident, he refilled a prescription for a muscle relaxer. Medical records show that claimant suffered muscle tightness in his thoracic and cervical area as far back as 2001 and lumbar pain as far back as 2004. X-rays taken in August 2004 showed he had extensive degenerative changes throughout his back.

On September 1, 2006, claimant saw his personal physician, Dr. James Lueger. He complained of neck and back pain. Dr. Lueger found that he had muscle spasms in his cervical, thoracic and lumbar paravertebral muscles and diagnosed him with cervical, thoracic and lumbar strain. He continued to treat claimant, and eventually referred claimant to Dr. Louis Pau for pain management.

Dr. Louis Pau is a board certified anesthesiologist with a specialty in pain management. He first evaluated claimant on December 12, 2006. Claimant told him he had pain in the bilateral posterolateral aspect of his neck, intermittent numbness in his superior trapezius from his neck to his right shoulder, and intermittent dull pain in the midline low back at the lumbosacral junction. An MRI of his lumbar spine showed degeneration and disc bulging at L4-5. Dr. Pau also ordered an MRI of his cervical spine, which revealed that claimant had a disc bulge and ostephyte at C5-6 and C6-7 that was compressing the thecal sac. The MRI also showed that claimant had end plate bone edema at the C5-6 level. Dr. Pau performed a cervical epidural steroid injection on March 19, 2007. Claimant told him that after the injection, the pain that had radiated along his right shoulder area was improved but he continued to have pain at the junction of his cervical and thoracic spine. Dr. Pau recommended that claimant get a TENS unit, which he did, but claimant said he was not sure it gave him any relief. During the time claimant was being treated by Dr. Pau, he was also seeing a chiropractor who had been using an activator on his neck and low back.

Dr. Pau last saw claimant on May 28, 2007, at which time claimant told him he was doing significantly better. He had good cervical and lumbar range of motion. Dr. Pau believed that claimant was at maximum medical improvement and was able to return to work.

After being released by Dr. Pau, claimant was again treated for his neck and low back pain by Dr. Lueger. In March 2008, Dr. Lueger talked to claimant about getting a job but said that claimant "definitely shouldn't be back driving a truck."[3]

[3] Stipulation for Admission of Medical Records (filed Oct. 31, 2008), at 19.

Dr. Lynn Curtis is board certified in physical medicine rehabilitation. He saw claimant at the request of claimant's attorney on August 20, 2007. Claimant complained of neck and back pain. He did not have arm or leg pain but said he had numbness and tingling in the fingertips of both hands. He said that if he lifted more than 20 pounds, he had low back pain. Upon examination, Dr. Curtis found that claimant had loss of sensation in the right leg and painful range of motion in the lumbar spine with moderate lumbar spasm, abnormal joint loading in his cervical spine, abnormal compression signs in his thoracic spine, and painful thoracic motion especially with rotation to the right. He also found claimant had positive compression tests over his external sternocleidomastoid muscles and trapezius bilaterally. He diagnosed claimant with a cervical neck injury, thoracic spine injury, and lumbar injury with radiculopathy.

Based on the AMA *Guides*,[4] Dr. Curtis rated claimant as having a 10 percent permanent partial impairment of the cervical spine, 3 percent permanent partial impairment of the thoracic spine, and 16 percent permanent partial impairment of the lumbar spine, which combine for a 26 percent permanent partial impairment of the whole person. He used the diagnosis related estimate (DRE) method when rating claimant's cervical impairment, finding him to be in Category III. However, he used the range of motion method in rating claimant's thoracic and lumbar impairment. Dr. Curtis attributed claimant's impairment to his work-related accident in August 2006.

Dr. Curtis placed restrictions on claimant which included: Lifting restrictions of 20 pounds off the floor and 20 pounds from waist to chest. He stated that claimant could bend and stoop occasionally. He should do no crawling, climbing of ladders, or walking at unprotected heights. Dr. Curtis reviewed the job task list prepared by Dick Santner. Of the 14 tasks on that list, Dr. Curtis opined that claimant is unable to perform 9 for a task loss of 64 percent.

Dr. Chris Fevurly is board certified in occupational medicine and is a board certified independent medical examiner. He examined claimant on November 29, 2007, at the request of respondent. He took a history from claimant, reviewed medical records, and performed a physical examination. Claimant reported his neck pain as a 7. He did not complain of pain radiating into his upper extremities but said he occasionally had numbness and tingling in the left hand index finger. Claimant rated his low back pain as a 5. The pain radiated into the left flank, but there was no pain into the lower extremities.

Dr. Fevurly diagnosed claimant with chronic regional neck pain with no evidence of radiculopathy or cord impingement, chronic regional low back pain with no evidence of radiculopathy, movement disorder unrelated to the accident, chronic anxiety disorder, chronic cigarette abuse, and hearing deficit. He opined that the degenerative changes in

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[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

claimant's cervical and lumbar spine shown on the MRI resulted as a natural consequence of living and aging.

Based on the AMA *Guides*, Dr. Fevurly rated claimant as being in the diagnosis related estimate (DRE) cervicothoracic Category II for a 5 percent whole person impairment, and in the DRE lumbosacral Category II for a 5 percent whole person impairment. Combining these, he rated claimant as having a 10 percent whole person impairment.

Dr. Fevurly gave claimant restrictions of lifting on an occasional basis to 50 pounds and on a frequent basis to 30 pounds. He should avoid prolonged repetitive bending, stooping or overhead looking. Dr. Fevurly reviewed the task list prepared by Dick Santner. Of the 14 tasks on that list, Dr. Fevurly believed that claimant is unable to perform 4 for a 28.5 percent task loss.

Dick Santner, a vocational rehabilitation counselor, met with claimant on October 8, 2007. They compiled a list of tasks claimant performed in the 15-year period before his accident. Claimant had not been able to find any work after the accident. Claimant left high school after 11th grade. He has no G.E.D. He had a CDL. He was 49 years old at the time of the interview.

Mr. Santner believed that claimant would be able to perform a fast food job or work in a convenience store. Minimum wage is $6.55 per hour. The upper end average for a fast food prep occupation is $7.14 per hour and for clerks in convenience store it is $7.60 per hour in claimant's labor market. Mr. Santner did not do a labor market survey in the Seneca, Kansas, area. Mr. Santner did not see claimant's medical records so was unable to render an opinion of his employability.

Claimant was not offered a job by respondent after his accident. About a year after the accident, claimant started making some telephone calls to prospective employers in an effort to find a job. He testified that during the time he was looking for work, he developed some health problems unrelated to his accident that delayed his job search. However, he said he applied for 15 to 20 jobs in the Seneca area but had not been offered a job. He told Mr. Santner that he had checked into delivery jobs, including fast food delivery, but the nature of that work is very sporadic in that region, and work is only part time if it is available at all.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2008 Supp. 44-501(c) states: "The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[5] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[6] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[7]

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

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[5] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[6] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[7] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

The Kansas Court of Appeals in *Watson*[8] held the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[9]

Despite the clear signals from recent decisions of the Kansas Supreme Court that the literal language of the statutes should be applied and followed whenever possible, there has yet to be a specific repudiation of the good faith requirement by the Supreme Court. Absent an appellate court decision overturning *Copeland*[10] and its progeny, the Board is compelled by the doctrine of *stare decisis* to follow those precedents. Consequently, the Board must look to whether claimant demonstrated a good faith effort post injury to find appropriate employment.

ANALYSIS

Claimant suffered permanent injuries and aggravations of his preexisting neck and back conditions in the August 29, 2006, work-related accident. As a result of that accident and his injuries, claimant is unable to return to his previous occupation as an over-the-road driver. He has permanent restrictions which limit his ability to perform tasks involving lifting, bending, stooping, crawling, climbing and walking. He also has a restricted range of motion in his neck and back.

Claimant's inability to return to his former profession, coupled with his work restrictions, limited education, and lack of transferrable job skills have reduced claimant's ability to earn wages. He has been unemployed since his accident. His job search efforts were limited by the number of employment opportunities in his geographic area and by personal health problems unrelated to his work-related injuries. Nevertheless, the Board finds that claimant failed to demonstrate a good faith job search. Therefore, a wage will

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[8] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001). But see *Gutierrez v. Dold Foods*, 40 Kan. App. 2d 1135, 199 P.3d 798 (2009); *Stephens v. Phillips County*, 38 Kan. App. 2d 988, 174 P.3d 452, *rev. denied* 286 Kan. ___ (2008); *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

[9] *Watson,* at Syl. ¶ 4.

[10] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, Syl. ¶ 7, 944 P.2d 179 (1997).

be imputed based upon his capacity to earn wages post accident. Claimant's job search efforts do not appear to have been focused on any particular type of work. Mr. Santner believed claimant could do fast food and convenience store jobs. These would probably pay between minimum wage and up to $7.60 per hour. The ALJ found claimant retained the ability to earn minimum wage and imputed a wage of $262 per week for purposes of calculating his wage loss. The Board agrees with this finding.

After comparing the restrictions recommended by the examining and treating physicians and considering the task loss opinions of Drs. Curtis and Fevurly, the ALJ determined claimant has lost the ability to perform 46.25 percent of the work tasks that he had performed during the 15-year period before his accident. The Board also agrees with this finding and adopts it as its own.

CONCLUSION

(1) Claimant has sustained a 46.25 percent task loss as a result of his work-related injuries.

(2) Claimant failed to prove he made a good faith job search. A weekly wage of $262 will be imputed to him post injury. Based upon a gross average weekly wage of $384.02 until April 30, 2007, and $564.02 thereafter, claimant's wage loss was 32 percent and 54 percent[11] respectively.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the November 26, 2008, Award and the December 10, 2008, Nunc Pro Tunc Award of Administrative Law Judge Rebecca A. Sanders are modified to find claimant's final work disability percentage is 50 percent rather than 49 percent, but is otherwise affirmed.[12]

The claimant is entitled to 34.86 weeks of temporary total disability compensation at the rate of $256.03 per week or $8,925.21, followed by 4 weeks of temporary total disability compensation at the rate of $376.03 per week or $1,504.12, followed by 195.57 weeks of permanent partial disability compensation at the rate of $376.03 per week or $73,540.19 for a 50 percent work disability, making a total award of $83,969.52.

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[11] The ALJ miscalculated this as 53 percent.

[12] Temporary total disability compensation was paid past April 30, 2007, when the compensation rate changed from $256.03 to $376.03 and, therefore, there was neither a period of time when claimant was entitled to receive permanent partial disability compensation at the lower weekly compensation rate nor at the lower percentage of work disability.

As of April 24, 2009, there would be due and owing to the claimant 34.86 weeks of temporary total disability compensation at the rate of $256.03 per week in the sum of $8,925.21, plus 4 weeks of temporary total disability compensation at the rate of $376.03 per week in the sum of $1,504.12, plus 99.57 weeks of permanent partial disability compensation at the rate of $376.03 per week in the sum of $37,441.31, for a total due and owing of $47,870.64, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $36,098.88 shall be paid at the rate of $376.03 per week for 96 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of April, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent Pinnacle Transportation Systems
Rebecca A. Sanders, Administrative Law Judge